Supreme Court, U.S.
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No. 96-1059

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

SYCUAN BAND OF MISSION INDIANS, et al.,
Petitioners,

v.

PETE WILSON, Governor of the State of California; and the State of California,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MEMORANDUM OF NINE RESPONDENT INDIAN TRIBES SUPPORTING POSITION OF PETITIONERS AND SUGGESTING DEFERRAL OF CONSIDERATION OF PETITION*

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Attorneys for San Manuel Band of Mission Indians

*The names of the nine respondent Indian tribes and their counsel are listed within.

January 27, 1997

The petition for certiorari, at page ii, lists ten Indian tribes that were parties to the proceedings below but which are not named parties to the petition for certiorari before this Court. These tribes must therefore appear before this Court as respondents pursuant to this Court's Rule 12.6. Nine of the ten tribes join in this memorandum in that capacity.

The nine tribal respondents, and their respective counsel, are as follows: (1) Rumsey Rancheria of Wintun Indians; (2) Table Mountain Rancheria; (3) Cher-ae Heights Indian Community of the Trinidad Rancheria;

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Howard L. Dickstein
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(4) San Manuel Band of Mission Indians;

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(5) Viejas Reservation of the Capitan Grande Band of Diegueno Mission Indians;

John Winkelman
5000 Willows Road
Alpine, CA 91901

(6) Hopland Band of Pomo Indians;

RAPPORT & MARSTON
Lester J. Marston
200 West Henry Street
Ukiah, CA 95482

(7) Cabazon Band of Mission Indians; (8) Santa Ynez Band of Chumash Mission Indians;

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and (9) Barona Group of the Capitan Grande Band of Mission Indians.

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MEMORANDUM OF NINE RESPONDENT INDIAN TRIBES SUPPORTING POSITION OF PETITIONERS AND SUGGESTING DEFERRAL OF CONSIDERATION OF PETITION*

MEMORANDUM

I. THE RULE 12.6 POSITION OF THE NINE RESPONDENT TRIBES.

This case was brought by 16 federally-recognized Indian tribes against the State of California and its Governor under the Indian Gaming Regulatory Act (hereinafter "IGRA"), 25 U.S.C. sections 2701-21. All 16 tribes were parties to the appellate proceedings before the Ninth Circuit, but only six of those tribes filed the petition for certiorari at issue here. The remaining ten tribes did not formally join in that petition, nor are they named as petitioners. Nine of those ten tribes (hereinafter "tribal respondents") accordingly invoke their right

under this Court's Rule 12.6 to be "considered respondents" and to file "a response supporting the petition.[1]

The tribal respondents support the petition for the reasons set forth by the petitioners. In the interest of brevity, those reasons will not be recounted here. The tribal respondents suggest, however, that the Court defer consideration of the petition.

II. THE TRIBAL RESPONDENTS SUGGEST THAT THE COURT DEFER CONSIDERATION OF THE PETITION.

The tribal respondents suggest that the Court defer consideration of the petition. See generally Southern Natural Gas Co. v. Fritz, 489 U.S. 1050 (1989) (deferring consideration of petition for certiorari); Lewis v. Licavoli, 400 U.S. 817 (1970) (same); Smith v. United States, 395 U.S. 902 (1969) (same); Brownes v. Union Bank of Switzerland, 348 U.S. 948 (1995) (same). Deferral is appropriate because, subsequent to the Ninth Circuit's decision in this case, the State of California and a federally-recognized tribe in California, the Pala Band of Luiseno Mission Indians,[2] have begun meaningful and productive negotiations for a tribal-state compact to govern class III gaming. All 16 tribes in this case, including the six petitioner tribes, fully support these ongoing compact negotiations.

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[1]See Stern, Gressman, Shapiro & Geller, Supreme Court Practice, sec. 6.20, pp. 323-25 (7th ed. 1993).

[2]See 61 Fed. Reg. 58211, 1996 WL 655490 (November 13, 1996) (listing Pala Band as a federally-recognized tribe). The Pala Band is not a party to this action.

The question of what types of games will be included in a tribal-state compact is at the core of this case, and is the subject of the Ninth Circuit's remand order. See Petitioners' Appendix at 23.[3] The Pala Band initiated these compact negotiations with California, proposing that the negotiations include:

> various types of "lottery games" as that term has been interpreted by the recent decision of the California Supreme Court in Western Telcon v. California State Lottery, [13 Cal. 4th 475 (1996)] as permitted by state law, including the use of on-line computers with video or other electronic displays to conduct lottery games.

Letter from Howard L. Dickstein to Governor Pete Wilson of August 31, 1996, a true and correct copy of which is attached hereto as Appendix 1.[4] The State accepted this proposed negotiation agenda: "The Governor is agreeable to negotiating over any types of lottery games allowable under State law to the full extent required by IGRA." Letter from Daniel M. Kolkey, Legal Affairs Secretary and Counsel to the Governor, to Howard L. Dickstein, dated August 31, 1996, a true and correct copy of which is attached hereto as Appendix 2. Thus

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[3]The Ninth Circuit's decision remanded to the district court the question of whether the permitted use of video lottery terminals in California obligates the State to negotiate with the tribes for gaming activities proposed in the tribes' complaints. See Petitioners' Appendix at 23. Even if the Court grants certiorari and reaches the merits of the petition, the remand question will nevertheless still need to be litigated in the district court, absent negotiation of a model compact.

[4]Mr. Dickstein is attorney for the Pala Band, as well as for several of the tribal respondents herein.

in addressing "various types of 'lottery games' ... including the use of on-line computers with video or other electronic displays to conduct such lottery games," Appendix 1, these negotiations overlap with the core issue raised by the Tribes' complaints which initiated this action[5]: namely, the types of class III games to be allowed on Indian lands in California. See Rumsey Complaint at para. 19 ("plaintiffs herein have each requested defendants to enter into tribal-state compact negotiations for, inter alia, the following enumerated class III games . . .").

The Pala Band "understand[s] that our negotiations could establish a model compact for use by other gaming Tribes in the State." Appendix 1. The Governor's office has similarly acknowledged that "any resulting compact [may] serve[] as a basis for negotiations with any other Tribes in the State ...." Appendix 2. The fact that these negotiations, if successful, will result in a compact that would serve as a model for other California Tribes, including the tribal respondents and petitioners herein, has significant implications for this case.

If a model compact is successfully negotiated, it would undoubtedly resolve the dispute between California and the tribes over the scope of permissible class III gaming, thereby effectively settling this case and rendering moot any further proceedings here. See U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership, ___ U.S. ___, 115 S.Ct. 386, 392 (1994) (recognizing "mootness resulting from settlement"); Ticor Title Ins. Co. v. Brown, 511 U.S. 117, ___ 114 S.Ct. 1359, 1362 (1994) (per curiam) (dismissing writ as improvidently granted where case subsequently settled, rendering petition for certiora-

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[5]This case began with the filing of four separate, but virtually identical, complaints which the district court consolidated into this action.

ri moot). While it is impossible to predict with certainty when these negotiations will be concluded, to date the sessions have been meaningful and productive. Thus the tribal respondents reasonably expect that the negotiations will come to a timely conclusion before this Court would be able to adjudicate the merits of this case. Deferral for a reasonable period of time, such as until the beginning of the next term of the Court, should therefore provide ample time within which the parties will know whether the negotiations have produced, or are likely to produce, a model compact.

The ongoing existence of these negotiations is a matter of public record, evidenced in part by a press release by the Governor's office, dated October 29, 1996, a true and correct copy of which is reproduced at Appendix 3 hereto. The Governor's office issued this press release in response to the Ninth Circuit's denial of a petition for rehearing in this action, commenting that the appellate court's action would not impact "California's ongoing gaming negotiations with Indian tribes ...." Appendix 3.

For these reasons, the tribal respondents submit that deferring consideration of the petition would conserve this Court's resources by avoiding unnecessary consideration of the petition's merits. Deferral would also conserve the substantial tribal and state resources that otherwise will necessarily be expended on this case, given the importance of the scope-of-gaming issue for hundreds of tribes and dozens of states nationwide. If the petition were to be granted, it can reasonably be expected that many amicus briefs will be filed in this case by other interested parties.

Moreover, deferral would further Congress' preference, codified in IGRA, that class III gaming on Indian lands be conducted pursuant to compacts negotiated by tribes and states. See 25 U.S.C. secs. 2710(d)(1)(C) & 2710(d)(3)(C). Congress established "the compact process ... as the centerpiece of the IGRA's regulation of class III gaming." Mashantucket Pequot

Tribe v. Connecticut, 913 F.2d 1024, 1030-31 (2d Cir. 1990), cert. denied 499 U.S. 975 (1991). As the Second Circuit recognized, "the heart of the ultimate legislative compromise regarding class III gaming," id. at 1030, was the tribal-state negotiation and compacting process described in IGRA's Senate Report:

> After lengthy hearings, negotiations and discussions, the Committee concluded that the use of **compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met** with respect to the regulation of complex gaming enterprises such as pari-mutuel horse and dog racing, casino gaming, jai alai and so forth. The Committee notes the strong concerns of states that state laws and regulations relating to sophisticated forms of class III gaming be respected on Indian lands where, with few exceptions, such laws and regulations do not now apply. The Committee balanced these concerns against the State jurisdiction over activities on Indian lands. **The Committee concluded that the compact process is a viable mechanism for setting various matters between two equal sovereigns**.

S. Rep. No. 446, 100th Cong., 2d Sess. 1, 13 (1988), reprinted in 1988 U.S. Code Cong. & Admin. News 3071, 3083 (emphasis added).

In short, IGRA's "whole idea was to foster these [tribal-state] compacts." Petitioners' Appendix at 5 (Canby, J.,

dissenting from denial of rehearing en banc).[6] This congressional preference for tribes and states to negotiate their differences is consistent with this Court's often-stated "preference that, where possible, [sovereigns] ... settle their controversies by mutual accommodation and agreement." Oklahoma v. New Mexico, 501 U.S. 221, 241 (1991) (internal quotations and citations omitted). See also Arizona v. California, 373 U.S. 546, 564 (1963); Colorado v. Kansas, 320 U.S. 383, 392 (1943); Nebraska v. Wyoming, 325 U.S. 589, 616 (1945).

Finally, deferral would promote improved tribal-state relations by allowing the parties to arrive at an allocation of regulatory authority over class III gaming in California through negotiations between sovereigns. The tribal respondents believe that a solution to the long-disputed question of the proper scope of class III gaming on Indian lands in California that is negotiated by tribal and state representatives stands the best chance of surviving the inevitable tests to come and of serving tribal, state, and federal interests in the long term.

III. CONCLUSION

The tribal respondents, while supporting the petition, accordingly suggest that the Court defer consideration of the petition pending resolution of the on-going tribal-state compact negotiations in the State of California, or alternatively, until the beginning of the next term of the Court.

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[6]Four active duty Circuit judges dissented from the denial of rehearing en banc in this case. Two senior status Circuit judges also joined in the dissent.

DATED this 27th day of January, 1997.

Respectfully submitted,

LEVINE & ASSOCIATES
Jerome L. Levine (Counsel of Record)
Frank R. Lawrence

Attorneys for Respondent San Manuel Band of Mission Indians

PNN13550

APPENDIX A

LAW OFFICES OF
DICKSTEIN & MERIN
ATTORNEYS AT LAW

HOWARD L. DICKSTEIN
MARK E. MERIN
JANE G. ZERBI

August 31, 1996

The Hon. Pete Wilson
Governor of the State of California
State Capitol
Sacramento, CA 95814

Dear Governor Wilson:

Please consider this letter a formal request from our client, the Pala Band of Mission Indians, a federally recognized Indian Tribe, to open negotiations with you immediately for a tribal-state compact under the Indian Gaming Regulatory Act to conduct Class III gaming on our tribal lands. The Pala Band is not currently engaged in any gaming activities.

We propose that our negotiations encompass various types of "lottery games" as that term has been interpreted by the recent decision of the California Supreme Court in Western Telcon v. California State Lottery, as permitted by state law, including the use of on-line computers with video or other electronic displays to conduct such lottery games. We are prepared to discuss reasonable l imitations on the number of such lottery game devices. In addition, we are also

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prepared to discuss the location of tribal gaming facilities; compensation for services by local law enforcement agencies; land acquisition issues; environmental impacts; health; safety; security; insurance; gaming integrity; patron complaints; traffic concerns; financial transactions; and other gaming regulatory issues. We understand that our negotiations could establish a model compact for use by other gaming Tribes in the state. Assuming a model compact is developed as a result of these discussions, it should serve as a basis for negotiation available to any federally recognized Tribe in California. We understand your position that such negotiations would be available only for those Tribes which have ceased illegal operations.

In order that these matters of vital interest be resolved, the Tribe urgently requests that negotiations commence in October, 1996. We look forward to your prompt response to this request.

Very truly yours,

DICKSTEIN & MERIN

/s/ Howard Dickstein

Howard Dickstein

HLD:bst

APPENDIX B

[CALIFORNIA STATE SEAL]

GOVERNOR PETE WILSON

August 31, 1996

Howard L. Dickstein
Dickstein & Merin
2001 P Street, Suite 100
Sacramento, CA 95814

Dear Mr. Dickstein:

We have received your letter to the Governor dated August 31, 1996, asking the Governor to open negotiations for a tribal-state compact under the Indian Gaming Regulatory Act ("IGRA") to conduct Class III gaming on the Pala Band's tribal lands. You represent that the Pala Band is not currently engaged in any gaming activities.

You ask that the Governor negotiate over "various types of 'lottery games'" as interpreted by the California Supreme Court in Western Telcon vs California State Lottery. The Governor is agreeable to negotiating over any types of lottery games allowable under State law to the full extent required by IGRA. The Governor is also agreeable to negotiating over the issues which you have raised in the second and third sentences in paragraph 2 of the letter. Finally, the Governor has no objection if any resulting compact serves as a basis for negotiations with any other Tribes in the State, which are not engaged in illegal gaming.

However, the Governor's long-standing position is that he will not negotiate with any Tribe that is engaged in Class III gaming in violation of IGRA. Accordingly, he will not negotiate with any Tribes which are engaged in illegal gaming. Any Tribe engaged in illegal gaming must remove all such games before any negotiations

with it begin. As a result, we will, of course, negotiate with you or any properly authorized representative of the Pala Band.

Since these negotiations may serve as a model compact, please rest assured that they will receive the Governor's close attention.

Very Truly Yours,

/s/ Daniel M. Kolkey

Daniel M. Kolkey
Legal Affairs Secretary and
Counsel to the Governor

STATE CAPITOL • SACRAMENTO, CALIFORNIA 95814 • (916) 445-2841

APPENDIX C

[CALIFORNIA STATE SEAL]

PR96:396

GOVERNOR'S OFFICE

WILSON PRAISES COURT DECISION ON INDIAN GAMING

State Has No Obligation to Negotiate Over Unlawful Gaming Activities

FOR IMMEDIATE RELEASE
Tuesday, October 29, 1996

CONTACT: Sean Walsh
Ron Low
916/445-4571

SACRAMENTO - Governor Pete Wilson today praised a decision by the Ninth Circuit Court of Appeals denying a petition for a rehearing in the *Rumsey Indian Rancheria v. Wilson* case. As a result of this decision, in entering gaming compacts with Indian tribes, the State has no obligation to negotiate over any gaming activity that is illegal in California

"The Ninth Circuit's denial of the petition for a rehearing in this case makes it undisputed in California that the Indian Gaming Regulatory Act does not require a state to negotiate over any gaming activity prohibited under state law," said Wilson.

"This decision reinforces California's position against expanding gaming in the State beyond those activities already authorized under state law," said Wilson. "However, we will, of course, continue to comply with our federal obligations to negotiate with Indian tribes over gaming activities which are permitted in California, specifically lottery games and horse racing."

The Ninth Circuit's ruling will not impact California's ongoing gaming negotiations with Indian tribes since the state had been proceeding under the assumption that the Ninth Circuit decision would reaffirm its earlier decision in the State's favor.

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